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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

No. CR 14-00306 WHA

Plaintiff,

v.

LUKE D. BRUGNARA,

Defendant.

**MEMORANDUM OPINION AND
FURTHER ORDER RE
DEFENDANT'S EXERCISE OF
HIS CONSTITUTIONAL RIGHT
TO PROCEED *PRO SE*;
APPOINTMENT OF
ATTORNEYS JAMES STEVENS
AND RICHARD TAMOR AS
ADVISORY COUNSEL**

INTRODUCTION

This criminal fraud and perjury prosecution, involving innumerable pretrial hearings, would have gone to verdict by now save and except for the fact that the accused absconded while on furlough from pretrial detention. After the United States Marshals tracked him down and returned him to custody, his lawyer moved to withdraw, which had to be granted. Rather than accept a new free lawyer, the accused demanded to waive his right to counsel and represent himself. A main purpose of this memorandum opinion is to set forth the procedural history leading to this decision and to the two-day *Farettta* hearing employed to vet the accused's decision.

STATEMENT

This prosecution began with a mail fraud indictment issued in June of 2014. For most of the time, the accused has been in pretrial detention, a decision affirmed by our court of appeals.

1 Federal Public Defender Brandon LeBlanc was appointed to represent defendant and a trial was
2 set for July 23. Then, at an evidentiary hearing before trial, defendant testified that Attorney
3 LeBlanc had blessed the plan for defendant to maintain possession of the artwork at issue. This
4 made Attorney LeBlanc a potential witness in the case, necessitated his moving to withdraw, and
5 led to the appointment of new counsel.

6 Attorney Erik Babcock was next appointed to represent the accused and a trial was set for
7 August 4. Two weeks before that date, the grand jury issued a superceding indictment, adding
8 wire fraud and false statement charges. As a result, the trial was continued to September 17.
9 Several weeks later, Attorney Babcock stated that he could not be ready for that date and the trial
10 was continued to October 22. Time passed. Due to a conflicting trial for another client,
11 Attorney Babcock requested another continuance to January 5, to ensure he could adequately
12 prepare for defendant Brugnara's trial. To help the defense prepare for trial, the undersigned
13 judge put in place a procedure so the accused could be furloughed (in civilian clothes) to the
14 custody of Attorney Babcock for the sole purpose of meeting in the attorney lounge at the federal
15 building for trial preparation (Dkt. No. 257). Despite this, Attorney Babcock again told the
16 Court that he could not be ready for a January 5 trial date. The trial was continued to February
17 26 (necessitating the re-alignment of prosecutors due to the departure of the lead prosecutor at
18 the end of January). The defense was warned that no more continuances would be granted.

19 On February 5, however, the accused absconded while on furlough, leaving the federal
20 building and remaining at large for six days until caught by U.S. Marshals. In subsequent
21 hearings, the accused has blurted out that Attorney Babcock "greenlighted" his dash out of the
22 courthouse. The grand jury issued a second superceding indictment, adding escape and
23 contempt charges. Attorney Babcock moved to withdraw and the undersigned judge granted his
24 motion (since Attorney Babcock will likely be a witness to whether he "greenlighted" the
25 absconding).

26 Attorney Jeffrey Bornstein was then appointed to represent defendant. Only one week
27 later, he moved to withdraw from the case, due to a severe personal conflict in style. This
28 motion was heard in camera, in part, and ultimately granted.

1 Defendant then expressed that he wished to proceed *pro se*. A *Faretta* hearing was set
2 for the following week. While defendant had blurted out in previous hearings that he “wanted to
3 go *pro se*,” he had always thought better of these requests and made up with counsel. This time,
4 however, defendant remained adamant about his desire to waive his right to counsel. The Court
5 asked Attorney Bornstein to attempt to reconcile his differences with defendant and to explain to
6 him the dangers of waiving his right to counsel. This was done. Attorney Bornstein reiterated
7 his need to withdraw from the representation and his motion to withdraw was granted.

8 In anticipation of Attorney Bornstein’s withdrawal, the Court inquired as to whether
9 Attorney George Boisseau would be willing to take on the representation, as defendant’s fourth
10 attorney in less than eight months. Attorney Boisseau stated that he would take the case, could
11 be ready for a July 6 trial date (but not sooner), and appeared at both days of the *Faretta* hearing.

12 Although Attorney Bornstein had explained the dangers of self-representation to the
13 accused, the Court understood its duty under *Faretta* and held a hearing devoted to that issue,
14 covering two days, on March 24 and 26. At the hearing, defendant was made aware of the nature
15 of the charges against him, the possible penalties, and the dangers and disadvantages of self-
16 representation. The undersigned judge stressed to defendant that he would have difficulty
17 preparing for trial from jail and thoroughly explained the consequences of waiving his right to
18 appointed counsel. Sergeant Daniel Dixon of Glenn Dyer jail testified at the second day of the
19 hearing. He meticulously described the restrictions and privileges available to *pro se* defendants
20 at Glenn Dyer. Sergeant Dixon also entered into the record a four-page document laying out the
21 procedures for *pro se* defendants at Glenn Dyer. Defendant took the time to read this document,
22 stated that he understood it, and reiterated his unequivocal request to proceed *pro se*.

23 During the *Faretta* colloquy, the Court made clear to defendant that he could have
24 Attorney Boisseau, one of the finest trial lawyers in California, represent him free of charge.
25 Attorney Boisseau met the accused, talked with him, and stood beside the accused at the *Faretta*
26 hearing. However, the Court also made clear that Attorney Boisseau would not be able to come
27 up to speed and try the case until at least July 6 — nor could any other new attorney in this case.
28 The Court further stressed that while it would attempt to make an April 27 trial date work, if the

1 accused represented himself, it could not guarantee that trial would begin on that date even if
2 defendant proceeded *pro se*, and that defendant should not make his decision based on the
3 premise of an April 27 trial date. The accused was advised that he had a clear choice to go with
4 Attorney Boisseau standing then beside him or to forego that opportunity and to exercise his
5 right to self-representation. He chose to represent himself.

6 While neither party made a motion for a mental competency exam, the Court, on its own,
7 raised the issue. Defendant remained vehement that he was and is mentally competent to
8 represent himself. The Court agrees. While defendant frequently has outbursts and is
9 confrontational in open court, these actions are part of his strategy of “persistence wears down
10 resistance,” as he himself put it. The Court has become extremely familiar with defendant,
11 having presided over his original tax fraud case, as well as this case, which has consisted of more
12 than twenty hearings. Thus, the Court has a good layman’s sense of the true mental competency
13 of the accused and this order finds, as he himself maintains, that defendant is mentally competent
14 to represent himself at trial and to waive his right to counsel. Defendant is a forceful, pushy, and
15 demanding man who tries to bull his way through — but he is mentally competent and insists
16 (correctly) that he is.

17 Based on defendant’s responses at the *Faretta* hearing, this order finds as follows:
18 Defendant understands the charges against him and the possible penalties. Defendant
19 understands the dangers and disadvantages of self-representation. Defendant understands that he
20 has a constitutional right to a free lawyer, but has refused one. Defendant has unequivocally and
21 voluntarily waived his right to a lawyer and has unequivocally and voluntarily exercised his
22 constitutional right to represent himself. Defendant understands the consequences of his
23 decision and is mentally competent to make this decision.

24 During the *Faretta* hearing, defendant was told that he had no right to advisory or
25 standby counsel, and that he should not proceed *pro se* with the expectation that he would be
26 provided with the help of a lawyer.

27 Nevertheless, after defendant fully waived his right to appointed counsel, the Court, in its
28 discretion, appointed Attorney James Stevens in a limited role to assist with the mechanics of

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1 transacting documents. Attorney James Stevens is allowed to act as a paralegal for defendant, to
2 be paid at a rate of \$85/hour. Stevens is authorized to spend a maximum of fifteen hours per
3 week on this case. Stevens' duties are as follows:

- 4 • assist with the transition of documents to and from defendant (including
5 subpoenas and other court documents, as well as helping defendant file
documents under seal);
- 6 • ensure that defendant is provided with copies of the Federal Rules of Criminal
7 Procedure, the Federal Rules of Evidence, and the Criminal Local Rules;
- 8 • Stevens shall meet with defendant twice a week for a maximum of one hour to
9 transfer documents back and forth (once on either Monday or Tuesday and once
on either Thursday or Friday of each week, at the discretion of Stevens);
- 10 • Stevens shall meet with the investigator who has been involved with the case and
11 pass on any information and documents from the investigator to defendant,
12 redacting any social security numbers and dates of birth;
- 13 • watch any video discovery with defendant during visits, abiding by the Glenn
14 Dyer procedures for *pro se* defendants;
- 15 • ensure that defendant has copies of all discovery produced by the government
16 that defendant does not currently have (including the witness list the government
17 produced for the pretrial conference in December).
- 18 • assist with the facilitation of loading an MP3 player with audio calls, upon
request of defendant for duplication and processing funds — this includes
Stevens dropping off and picking up the materials to be loaded onto the MP3
player at Colour Drop — defendant, however, will be responsible for preparing
the ex parte application and order directing Glenn Dyer to allow him to have
access to the MP3 player.

19 Under no circumstances may Stevens conduct any legal research for defendant, assist
20 defendant in preparing a bail motion, assist defendant in preparing an appeal, or fill out any
21 subpoena forms for defendant (though Stevens may bring the forms for defendant to fill out
himself and Stevens may fill out the address portion of the subpoena forms for defendant).

22 Because Attorney Stevens has limited experience, the Court sought out one of the
23 esteemed members of our Criminal Justice Act panel, Richard Tamor, to act as advisory counsel
24 to the accused in the ways spelled out below. Attorney Tamor's role shall be as follows:

25 Attorney Tamor shall meet a maximum of twice per week with defendant in order to
26 provide technical assistance to help him prepare for trial. He shall also attend all hearings,
27 attend each day of the trial, and be available for consultations with the accused.

1 "Technical assistance includes":

2 A. Informing defendant of the format of motions or other pleadings or
3 documents;

4 B. Informing defendant of technical pre-trial and trial procedure (*i.e.*, format
5 and phases of discovery and trials);

6 C. Providing materials available on the Northern District of California
7 website;

8 D. Answering questions regarding non-legal technical aspects;

9 E. Explaining the rules of evidence, local rules, criminal rules, and how they
10 pertain to trial procedure.

11 Attorney Tamor will not make any arguments or representations on defendant's behalf or
12 sign any pleadings or any other documents on his behalf to this Court, any other court, agency or
13 entity.

14 Attorney Tamor will not under any circumstances provide any substantive legal advice
15 of any kind or nature.

16 "Substantive legal advice" includes, but is not limited to:

17 A. legal research;

18 B. drafting, preparing, reviewing, responding to or researching of any
19 pleadings or motions whatsoever;

20 C. giving any strategical advice whatsoever;

21 D. drafting, preparing, or responding to motions in limine;

22 E. giving advice regarding the admissibility of evidence; and/or

23 F. giving advice regarding jury instructions.

24 Attorney Tamor will not act as a messenger, paralegal, or administrative assistant and
25 will not act or function as a messenger or conduit between defendant and the Court or
26 government counsel or any other agency or entity (but Attorney Stevens has responsibilities in
27 this regard).

1 Attorney Tamor will be appointed and compensated pursuant to the Court's inherent
2 authority as an expert consultant under 5 U.S.C. Section 3109, and not under the Criminal
3 Justice Act. Attorney Tamor will therefore serve exclusively on behalf of the Court to protect
4 the integrity and continuity of proceedings and again does not represent defendant.

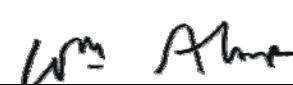
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7 **IT IS SO ORDERED.**

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9 Dated: April 2, 2015.


WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

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